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No. 90-327

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JOSEPH F. SPANIOL, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, NANCY A. HIORTDAHL and DON LUHRSEN,
Petitioners,

v.

TELLY KANAKIS and PATRICIA KANAKIS,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners, The Mutual Life Insurance Company of New York, Nancy A. Hiortdahl, and Don Luhrsen (collectively, "Mutual Of New York"), respectfully submit this Reply Brief in further support of their Petition for a Writ of Certiorari to the Supreme Court of California.

I. RESPONDENTS BLATENTLY MISSTATE THE HOLDINGS OF THE SEVENTH AND NINTH CIRCUITS IN SUPPORT OF THE STATE COURT'S NOVEL INTENT REQUIREMENT

Respondents have misstated the relevant holdings of the Seventh and Ninth Circuit Courts of Appeals. Respondents state (Brief in Opposition ("Brief in Opp."), p. 12) that the California Court of Appeal's requirement that an employer intend to create a plan to be governed by the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et seq.* (1982)

("ERISA") is supported by the Seventh Circuit in *Wayne Chemical, Inc. v. Columbus Agcy. Serv. Corp.*, 567 F.2d 692 (7th Cir. 1977), (upon which the trial court relied) and that *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732 (7th Cir. 1986), (the case cited by Petitioners) further supports an intent requirement.

While the *Wayne Chemical* employer had originally purchased group medical insurance for its employees, its agents (without the employer's prior consent) transferred the program to an unauthorized insurer purporting to establish a multi-employer trust. The court in *Wayne Chemical* determined that the employer had no knowledge of the existence of the plan purportedly established by the trust or of the trust itself and "never entered into an agreement to establish any plan." *Wayne Chemical, Inc. v. Columbus Agcy. Serv. Corp., supra*, 567 F.2d at 699. The court, therefore, held that in order for an employer to become a participant in, or establish or maintain a plan, the employer must *intend* to form an employee benefit plan. The decision, however, did not impose a further requirement that the employer must intend that the plan be governed by ERISA.

Respondents' quote from *Ed Miniat* (Brief in Opp., p. 12) is misleading because it conveys the impression that the court required employer intent to create a plan governed by ERISA; when in fact an employer need only intend to provide benefits to its employees. The excerpt must be read in its context, which is as follows:

> At most the cases suggest that, when the sole employee of a corporation, for that employee's own benefit or for that of his or her family, subscribes to a trust, the necessary *intent* on the part of the corporation *to provide benefits* for its employees may be lacking. Thus, although *Donovan* and *Taggart* are not controlling here, they do support the defendant's broader contention that we should examine the corporation's intent. In the case before us the corporation has via a written agreement, established its *intent* potentially *to provide benefits* to all salaried employees. This is not a case, like *Taggart*, in which a

> corporation arguably failed to express the necessary intent.

Ed Miniat, Inc. v. Globe Life Ins. Group, Inc., supra, 805 F.2d at 741 (emphasis added). Respondents can not dispute the fact that Mrs. Kanakis' employer, Insurance Systems Incorporated ("ISI"), intended to provide benefits to its employees. In fact, in its announcement, ISI stated:

> It gives us considerable pleasure to announce to you that we have completed arrangements for a plan of Group Insurance offering benefits for you and your dependents.
>
> Our Plan is known as the Insurance Systems, Incorporated Employee Benefit Plan and is being underwritten under a group insurance contract issued by Mutual of New York . . . .

Appendix to Petition ("App.") at 46a.

Respondents cite the California Court of Appeal's misplaced reliance on *Kanne v. Connecticut Gen. Life Ins. Co.*, 859 F.2d 86 (9th Cir. 1988), amended on denial of rehearing, 867 F.2d 489 (1988) (en banc), cert. denied, 109 S.Ct. 3216 (1989), as authority for their assertion that the Ninth Circuit imposes an ERISA plan intent requirement.

In its unpublished opinion,* the California Court of Appeal cited *Kanne* as authority for its novel holding

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* Respondents argue that the unpublished opinion of the California Court of Appeal has no precedential value and cannot conflict, therefore, with the numerous federal cases that impose no requirement of employer intent or administrative activity. Respondents imply that a California state court may effectively preclude review of its decision by declaring that the decision not be published. That argument is frivolous. The Court will reverse state court opinions that conflict with federal law whether they are published or unpublished. *See Perry v. Thomas*, 482 U.S. 483 (1987) (reversing an unpublished opinion of the California Court of Appeal, Second Appellate District). The fact that a decision is unpublished "carries no weight in [the Court's] decision to review the case." *Commissioner of Internal Revenue v. McCoy*, 484 U.S. 3, 7 (1987), rehearing denied 484 U.S. 982 (1987).

that "as a prerequisite to the creation and existence of an ERISA plan, the employer *must intend to create and to participate* in such a plan." App. at 15a; emphasis added. *Kanne* does not support the California court's holding.

The California court extended *Kanne*'s reference to a plan brochure "evidencing the intent to create an ERISA plan" in the context of a discussion relating to whether the multi-employer trust was merely advertising the group insurance or endorsing the program within the meaning of Department of Labor regulations (29 C.F.R. § 2510.3-1(j)(3)) to a holding that an employer's intent is a "prerequisite" to the creation of an ERISA plan. The California court's blatently contrived holding is not supported by any legal authority in the Ninth Circuit or of this Court.

Mutual Of New York's reliance on *Shaw v. Delta Airlines*, 463 U.S. 85 (1983), is appropriate. This Court, in *Shaw*, held that subjective intent cannot supplant objective criteria to determine whether a plan is maintained "solely" for the purpose of compliance with ERISA. In substantiating the California court's holding, contrary to *Shaw*, that the subjective intent of an employer is a factor to be considered, Respondents vehemently contend (i) that an officer of ISI had no knowledge whether ERISA governed the ISI Plan; (ii) that there is no proof that the ISI letter to employees (describing the ISI plan as being designed to meet the requirements of ERISA) and the booklet entitled "Group Insurance Benefits" (App. 46a-72a) were distributed to the employees of ISI, and (iii) that those documents were not drafted by ISI. Brief in Opp., p. 4. This evidence was the basis on which the jury found a lack of employer intent to establish an ERISA plan. Accordingly, Respondents have inadvertently bolstered Mutual of New York's case by proving the materiality of the erroneous jury instruction—an

instruction that is contrary to this Court's holding in *Shaw*.

II. RESPONDENTS MISCONSTRUE THE FACTS AND HOLDINGS OF *FORT HALIFAX* AND *KANNE* TO SUPPORT A REQUIREMENT OF ADMINISTRATIVE ACTIVITY BY AN EMPLOYER

This Court in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), determined that a one-time severance payment did not implicate the concerns of ERISA, as it did not involve the administration of a plan and the obligation of an employer to pay benefits on a regular basis. The lack of administrative activity in *Fort Halifax* was cited as authority by the California Court of Appeal to invent a requirement that to create an ERISA plan the employer must perform the plan administrative duties *to the exclusion of all others*. Such a holding is inconsistent with the mandates of ERISA § 3(1), 29 U.S.C. § 1002(1), and distorts this Court's holding in *Fort Halifax*.

Citing its summary affirmance of lower court decisions in *Holland v. Burlington Industries, Inc.*, 477 U.S. 903 (1986), and *Gilbert v. Burlington Industries, Inc.*, 477 U.S. 901 (1986), this Court noted in *Fort Halifax* that severance payments from a benefit plan paid from general assets of an employer would implicate the concerns of ERISA and constitute an ERISA plan. *Fort Halifax Packing Co. v. Coyne, supra*, 482 U.S. at 17. The distinction noted by the Court was that in the *Burlington* cases "there was a 'plan' and the only issue was whether the type of benefits paid by that plan are among those covered by ERISA." *Id.* at 18. In holding that ERISA governed, the Court reasoned that "if an employer has an administrative scheme for paying benefits, it should not be able to evade the requirements of the statute

[ERISA] merely by paying those benefits out of general assets." *Id.*

Under the holding of the California Court of Appeal in this case, employers may evade the requirements of ERISA simply by delegating performance of the administrative plan functions to a third party. Certainly, *Fort Halifax* does not support such a result.

In their final effort to support the opinion of the California Court of Appeal, Respondents argue that *Kanne* requires that an employer must administer a plan for it to be governed by ERISA.

The plaintiffs in *Kanne* argued on appeal that the group health insurance plan administered by a multi-employer trust was not an ERISA plan. The Ninth Circuit rejected the argument, as it found that the trust did not merely "advertise the group insurance, but rather, as administrator of the plan, 'endorses' it within the meaning of 29 C.F.R. 2510.3-1(j)(3)." *Kanne v. Connecticut General Life Ins. Co., supra*, 867 F.2d at 493.

Understandably, Respondents merely cite to the California Court of Appeal's incorrect analysis of *Kanne* (Brief in Opp., pp. 16-18). The California court, however, incorrectly reasoned that because the ISI Plan did not resemble the multi-employer plan in *Kanne*, the ISI Plan could not be governed by ERISA. A multi-employer trust, however, is but one vehicle used to establish employee benefit plans. ERISA § 3(5), 29 U.S.C. § 1002(5). There is no dispute that ISI, as the plan sponsor, endorsed the plan, designated the administrator, paid premiums for employees and, as such, did more than simply advertise the program. App. at 46a-47a.

The *Kanne* court searched for administrative activity by *any entity*, and found that the employer group was the administrator. The court did not hold that the em-

ployer had to be involved in administrative activity and, in fact, specifically noted that the Kannes had incorrectly assumed that the employer's functions with respect to the plan determined ERISA coverage. *Kanne v. Connecticut General Life Ins. Co., supra*, 867 F.2d at 492-493.

The contrived nature of the California court's holding cannot be understated. The court ignored the existence of an employee benefit plan and misapplied the holdings of this Court and that of the Ninth Circuit to justify a windfall to the Respondents. It then purportedly neutered the holding by declaring it to be "unpublished." Although Mr. Kanakis suffered serious injury, the California court's willingness to yield to the emotional pleas of Respondents (App. at 3a-4a) does not make sound law. The decision should not be permitted to stand.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition and Brief Amici Curiae of American Council of Life Insurance and Health Insurance Association of America, a writ of certiorari should issue to examine the denial of a petition for review by the Supreme Court of California.

Respectfully submitted,

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